Strongkota Development Sdn Bhd v Lembaga Lebuhraya Malaysia & Anor

HIGH COURT (PULAU PINANG) — SUIT CIVIL NO 22–538 OF 2001
ZAKARIA SAM J
20 OCTOBER 2011

Tort — Duty of care — Delay in acquiring plaintiff's land — Whether defendants owed plaintiff a duty of care — Whether defendants responsible for delay in acquisition of plaintiff's land — Whether defendants responsible for MPPP's decision to approve extension of plaintiff's application for planning permission — Whether defendants' could reasonably foresee that their instructions to MPPP not to renew plaintiff's application for planning permission and delay in acquisition of land would cause plaintiff to suffer losses — Whether plaintiff entitled to claim interest on value of land

The plaintiff a developer purchased a plot of land in Penang ('the land') with the intention of developing it. However the plaintiff was unable to proceed with its development plans because the Majlis Perbandaran Pulau Pinang ('MPPP') had refused to renew the plaintiff's planning permission on the grounds that the land was affected by the proposed construction of the Penang Outer Ring Road project ('the road project'). The plaintiff claimed that the MPPP had refused to renew its planning permission upon the directions of the acquiring authorities, namely the first defendant, a statutory agency of the Ministry of Public Works, and the Director General of the Public Works Department ('the second defendant'). On 22 October 2001 the plaintiff commenced the instant suit against the defendants whereby it sought damages of RM48,736,931.70 for the losses it had suffered due to its inability to continue its development plans and from the defendants' failure to acquire the plaintiff's land promptly, exemplary damages, interest and costs. On 20 November 2003, the land was finally acquired under s 8 of the Land Acquisition Act 1960 ('LAA'), and the full compensation amount in respect of the said acquisition was paid to the plaintiff after a consent judgment was recorded on 6 August 2007. In its defence, the first defendant submitted that it was not liable to the plaintiff for any delay in the acquisition of the plaintiff's land, because the decision as to whether and when to acquire the plaintiff's land was made by the government of Malaysia. The first defendant also submitted that the failure of the plaintiff to obtain the extension of the planning permission from MPPP did not involve it. The second defendant argued that since the plaintiff's land had been acquired by the government

since this suit was filed, the plaintiff did not have an existing cause of action against the defendants. A

Held, allowing the claim with interest and costs:

(1) From the facts of this case it was very clear that the defendants were involved in the acquisition of the plaintiff's land and that they were responsible for the MPPP's decision as to whether to approve the extension of the planning permission. The letter dated 18 May 2007 from the first defendant to the state legal officer proved that the first defendant was actively involved in the acquisition of the plaintiff's land on behalf of the government and even had the power to decide how much compensation was to be paid to the plaintiff. It was also clear from the facts that the defendants could reasonably foresee that their instructions to MPPP not to renew the plaintiff's application for planning permission and that the delay in the formal acquisition of the plaintiff's land would cause the plaintiff to suffer losses. As such, the defendants owed the plaintiff a duty of care to either ensure that the plaintiff's land, which was affected by the road project, was either formally acquired under the LAA expeditiously or the plaintiff was given liberty to develop its land. In the circumstances, there was no merit in the defendants' argument that they were not the parties responsible for the acquisition of the plaintiff's land (see paras 42, 47 & 69–72). B C D E

(2) The *Hansard* report reinforced the plaintiff's case that the defendants were the parties responsible in determining whether the extension of the planning permission could be issued by the MPPP. Further the letter from the second defendant to the MPPP proved that the second defendant was responsible for the extension of the planning permission. If not for the road project and the direction by the second defendant to MPPP, the plaintiff's planning permission would have been approved and the plaintiff could have proceeded with its development plans. The plaintiff should not be penalised for any delay in the acquisition of its land, when there was no evidence of any interference by the plaintiff or the plaintiff being the cause of the delay (see paras 40, 44, 66 & 68). F G

(3) It was found that the plaintiff suffered losses as a result of the defendants' failure to acquire the plaintiff's land formally within a reasonable time. The court found that the plaintiff's valuation of its land at RM105 psf was a fair value and that the plaintiff was entitled to claim interest on the value of the land. Based on the evidence the plaintiff was awarded damages in the sum of RM7,693,131 for loss of interests at an interest rate of 2% per annum on the land area of 8.41 acres at RM105 psf. However, the plaintiff's claim for damages for loss of income and exemplary damages was disallowed (see para 92). H I

(4) The defendants' argument that the plaintiff did not have an existing

cause of action against them because it had already been compensated for the acquisition of the land could not stand. The compensation paid was only in respect of the value of the land and not in respect of the damages sought in this suit (see para 91).

[Bahasa Malaysia summary

Plaintif adalah pemaju yang membeli sebidang tanah di Pulau Pinang ('tanah tersebut') dengan niat membangunkannya. Walau bagaimanapun plaintif tidak dapat meneruskan rancangan pembangunannya kerana Majlis Perbandaran Pulau Pinang ('MPPP') enggan memperbaharui kelulusan perancangan plaintif atas alasan bahawa tanah tersebut terjejas akibat cadangan pembinaan Projek Jalan Lingkaran Luar Pulau Pinang ('projek jalanraya tersebut'). Plaintif mendakwa bahawa MPPP enggan memperbaharui kelulusan perancangan atas arahan-arahan pihak berkuasa perolehan, iaitu defendan pertama, agensi badan berkanun Kementerian Kerja Raya, dan Ketua Pengarah Jabatan Kerja Awam ('defendan kedua'). Pada 22 Oktober 2001, plaintif telah memulakan guaman ini terhadap defendan-defendan di mana ia memohon ganti rugi sebanyak RM48,736,931.70 untuk kerugian yang dialaminya akibat ketidakupayaan untuk meneruskan rancangan-rancangan pembangunannya akibat kegagalan defendan-defendan memperoleh tanah plaintif dengan segera, ganti rugi teladan, faedah dan kos. Pada 20 November 2003, tanah tersebut akhirnya dapat diperoleh di bawah s 8 Akta Pengambilan Tanah 1960 ('APT'), dan jumlah pampasan penuh berhubung pemerolehan tersebut telah dibayar setelah penghakiman persetujuan direkodkan pada 6 Ogos 2007. Dalam pembelaannya, defendan pertama berhujah bahawa ia tidak bertanggungjawab terhadap plaintif untuk apa-apa kelewatan dalam pemerolehan tanah plaintif, kerana persetujuan berhubung sama ada dan bila untuk memperoleh tanah plaintif dibuat oleh kerajaan Malaysia. Defendan pertama juga berhujah bahawa kegagalan plaintif memperoleh lanjutan untuk kelulusan perancangan daripada MPPP tidak melibatkannya. Defendan kedua berhujah bahawa memandangkan tanah plaintif telah diperoleh oleh kerajaan sejak guaman ini difailkan, plaintif tidak mempunyai apa-apa kausa tindakan sedia ada terhadap defendan-defendan.

Diputuskan, membenarkan tuntutan dengan faedah dan kos:

(1) Berdasarkan fakta kes ini adalah jelas bahawa defendan-defendan terlibat dalam pemerolehan tanah plaintif dan bahawa mereka bertanggungjawab untuk keputusan MPPP berhubung sama ada untuk melanjutkan kelulusan perancangan itu. Surat bertarikh 18 Mei 2007 daripada defendan pertama kepada pegawai undang-undang negeri membuktikan bahawa defendan pertama telah giat terlibat dalam pemerolehan tanah plaintif bagi pihak kerajaan bahkan mempunyai kuasa untuk menentukan jumlah pampasan yang perlu dibayar kepada plaintif. Adalah juga jelas berdasarkan fakta bahawa defendan-denfendan

dapat menjangka dengan munasabah bahawa arahan-arahan mereka kepada MPPP untuk tidak memperbaharui permohonan kelulusan perancangan plaintif dan bahawa kelewatan dalam pemerolehan rasmi tanah plaintif akan mengakibatkan plaintif mengalami kerugian. Oleh itu, defendan-defendan mempunyai kewajipan berjaga-jaga terhadap plaintif untuk sama ada memastikan tanah plaintif, yang terjejas akibat projek jalan raya tersebut, telah diperoleh sama ada secara rasmi di bawah APT atau plaintif telah diberikan kebebasan untuk membangunkan tanahnya itu. Dalam keadaan sedemikian, tiada merit dalam hujah defendan-defendan bahawa mereka bukan pihak-pihak bertanggungjawab untuk pemerolehan tanah plaintif tersebut (lihat perenggan 42, 47 & 69–72).

(2) Laporan *Hansard* menguatkuasakan kes plaintif bahawa defendan-defendan adalah pihak-pihak bertanggungjawab untuk menentukan sama ada lanjutan kelulusan perancangan tersebut boleh dikeluarkan oleh MPPP. Selain itu surat daripada defendan kedua kepada MPPP membuktikan bahawa defendan kedua bertanggungjawab untuk lanjutan kelulusan perancangan tersebut. Jika bukan kerana projek jalan raya tersebut dan arahan oleh defendan kedua kepada MPPP, kelulusan perancangan plaintif boleh diluluskan dan plaintif boleh meneruskan dengan rancangan-rancangan pembangunannya. Plaintif tidak patut dihukum untuk apa-apa kelewatan dalam pemerolehan tanahnya, apabila tiada keterangan apa-apa campur tangan oleh plaintif atau plaintif merupakan sebab kelewatan tersebut (lihat perenggan 40, 44, 66 & 68).

(3) Adalah didapati bahawa plaintif mengalami kerugian akibat daripada kegagalan defendan-defendan untuk memperoleh tanah plaintif dalam masa yang munasabah. Mahkamah mendapati bahawa pentaksiran plaintif untuk tanahnya pada kadar RM105 setiap kaki persegi ('skp') adalah nilai yang adil dan bahawa plaintif berhak menuntut faedah ke atas nilai tanah tersebut. Berdasarkan keterangan tersebut plaintif diawardkan ganti rugi berjumlah RM7,693,131 untuk kerugian faedah pada kadar faedah 2% setiap tahun atas kawasan tananh seluas 8.41 ekar pada RM105 skp, Walau bagaimanapun, tuntutan ganti rugi kehilangan pendapatan dan ganti rugi teladan plaintif tidak dibenarkan (lihat perenggan 92).

(4) Hujah defendan-defendan bahawa plaintif tidak mempunyai kausa tindakan sedia ada terhadap mereka kerana ia telah diberi pampasan untuk pemerolehan tanah tersebut tidak boleh kekal. Pampasan yang dibayar hanya berkaitan nilai tanah tersebut dan bukan berkaitan ganti rugi yang dipohon dalan guaman ini (lihat perenggan 91).

Editorial Note: This case supersedes the previous publication of the same in [2012] 2 MLJ 265.]

Notes

For cases on tort in general, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1–2096.

Cases referred to

Henderson v Merrett Syndicates Ltd & Others [1994] 3 All ER 506, HL (refd)
Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)
Chandra Bansi Singh and others v State of Bihar and others AIR 1984 SC 1767, SC (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575; [1964] AC 465, HL (refd)
National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144, CA (refd)
Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors [1986] 1 MLJ 362, PC (distd)
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35, FC (distd)
Pemungut Hasil Tanah, Kuantan v Oriental Rubber & Palmoil Sdn Bhd [1986] 1 MLJ 39, SC (distd)
Stansbie v Troman [1948] 2 KB 48, CA (refd)
Superintendent of Lands and Survey (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Uda Holdings Bhd v Koperasi Pasar Raya (M) Bhd and other appeals [2009] 1 MLJ 737, FC (refd)
Welsh v Chief Constable of the Merseyside Police [1993] 1 All ER 692 (refd)

Legislation referred to

Highway Authority Malaysia (Incorporation) Act 1980 ss 4, 11
Land Acquisition Act 1960 ss 4, 8, 32
National Land Code
Street, Drainage and Building Act 1974 ss 12, 46
Town and Country Planning Act 1976 s 19, 20, 21, 21(2), 22

Ghazi bin Ishak (B Jeyasingam and Nicholas Kow with him) (Ghazi & Lim) for the plaintiff.
Ramesh Sanghvi (Kassim Tadim & Wai & Co) for the first defendant.
Norhisham Ismail (Senior Federal Counsel, Attorney General's Chambers) for the second defendant.

Zakaria Sam J:

INTRODUCTION

[1] The plaintiff is a developer.

[2] The first defendant is a corporate body incorporated under the Highway Authority Malaysia (Incorporation) Act 1980 ('HAMA') and has a statutory obligation under s 11 of the HAMA to supervise and execute the design, construction and maintenance of highways as determined by the Government of Malaysia. The first defendant is also a statutory agency of the Ministry of Public Works Malaysia ('Ministry of Works'). A B

[3] I&P Development Sdn Bhd ('I&P') had on 6 September 1991 obtained permission from Majlis Perbandaran Pulau Pinang ('MPPP') to construct 148 units of four – ten storey medium costs apartment on their land, in Section 5, Town of Georgetown Penang in respect of Lot Nos 4723 HS(D), 2834, 4724 HS(D), 2835, 4725 HS(D) 2836, 4726 HS(D) 2837, 4727 HS(D) 2838, 4728 HS(D), 2839, 4729 HS(D), 2840, 4730 HS(D), 2841, 4731 HS(D) 2842, 4732 HS(D) 2843, Plot A (PT 21 HS(D) 2866), Lot Lama Nos 4757 (PT 22 HS (M) 2867, Lot Lama Nos 4758 (PT 23 HSD(D) and Lot Lama No 4759 (PT 24 HS(D) 2869 ('the said land'). C D

[4] However I&P's planning permission had expired on 5 September 1994.

[5] Notwithstanding that, I&P entered into a sales and purchase agreement ('SPA') with the plaintiff on 6 July 1995 to sell the said land to the plaintiff then with the expired planning permission. E

[6] It was I&P that applied to MPPP for renewal of the planning permission and MPPP granted I&P the renewal of the planning permission until 5 September 1995. F

[7] The plaintiff proceeded with their plan to develop an area of 5.0786 acres of the said land and the remaining area was to be used for future development, road reserve and open space in accordance with the approved plans by MPPP. G

[8] When the planning permission expired on 5 September 1995, the plaintiff on behalf of I&P applied for the extension of the planning permission on 6 September 1995, 25 August 1996 and 8 September 1997 by paying the necessary fees which was accepted by MPPP. However, MPPP rejected the extension of the planning permission by their letter dated 18 October 1997 to I&P on the basis that the property was affected by the proposed construction of Penang Outer Ring Road ('PORR'). The revision of the alignment was no longer possible as the PORR project was going to effect the said land. H I

[9] The plaintiff proceeded to file this civil suit on 22 October 2001 (which was twice amended on 14 September 2007 and 13 January 2009). The reliefs

sought under the amended statement of claim are as follows:

a damages of RM48,736,931.70 from the defendants to be paid (at the sum to be determined by the court);

b aggravated damages;

c interest on the damages at the rate of 8%pa from 19 May 1997 until full payment; and

d costs.

[10] At the point of filing this suit on 22 October 2001, the said land was not formally acquired.

[11] The said land was finally acquired under s 8 of the Land Acquisition Act 1960 ('LAA') for RM20,429,288.04 on 20 November 2003. The increase in compensation of RM18,723,220.48 was finally paid after parties agreed to enter a consent order on 6 August 2007.

THE PLAINTIFF'S CASE

[12] As a consequence of the decision made by the first and second defendants to construct the PORR project on the entire portion of the plaintiff's land comprising 8.5 acres, the plaintiff could not proceed with it's development plans as MPPP had refused to renew the planning permission upon the directions by the defendants who were the bodies on whose behalf the said land was subsequently acquired. The defendants did not acquire the plaintiff's 8.5 acres for the PORR project and this led to the plaintiff filing this claim for losses of RM48m as particularised in amended *lampiran* A to the re-amended statement of claim:

Kerugian kehilangan kegunaan tanah seluas 167,884.71 kaki persegi x RM109.00 sekaki persegi	RM18,299,433.40
ii. Kerugian pendapatan dari 148 unit kondominium 4 blok 4 – 10tingkat	RM 8,759,710.00
iii. Kerugian kehilangan kegunaan tanah seluas 198,878.70 sekaki persegi x RM109.00 sekaki persegi	RM21,677,778.30
Jumlah	RM48,736,931.70

[13] It is the plaintiff's case that both the defendants are in breach of the law as the defendants failed to take any steps on an urgent basis or within a reasonable time to acquire the plaintiff's land that was affected by the PORR project. This had resulted in losses to the plaintiff as the plaintiff was prevented

from utilising the plaintiff's land for it's intended development and neither was it formally acquired and compensation was paid by the defendants.

[14] The plaintiff could not proceed with its development plans as it's entire land of 8.5 acres was affected by the PORR project. The acquiring authorities, ie the first and second defendants formally acquired the plaintiff's land by issuing a s 8 notice of the LAA, only on 23 October 2003 and which was gazetted on 20 November 2003. Full compensation amount in respect of the acquisition of the said land was paid after a consent judgment was recorded in court on 6 August 2007 (vide Penang High Court Land Reference No 15–6 of 2005 ('the land reference').

THE FIRST DEFENDANT'S CASE

[15] The first defendant's case is that the decision as to whether and when to acquire the plaintiff's land is not a decision by the first defendant but by the Government of Malaysia.

[16] The first defendant claimed that initially it was not directed by the Government of Malaysia to take steps to acquire any of the lands affected by the PORR project including the plaintiff's land prior to the proper and formal finalisation and execution of a concession agreement between the Government of Malaysia and the concessionaire appointed by the Government of Malaysia to implement the PORR project.

[17] The first defendant's contention is that it had taken all reasonable and proper steps which led to the acquisition of the plaintiff's land of 8.5 acres after the decision was made by the Economic Planning Unit, ('EPU'), Prime Minister's Department and as directed by the EPU for the early acquisition of the plaintiff's land.

[18] The first defendant further claimed that it is not liable to the plaintiff for any delay in the decision made by the Government of Malaysia to acquire the plaintiff's land for the PORR project or for the delay in the finalisation of the alignment of the PORR project.

[19] It is also the first defendant's case that the plaintiff is estopped from proceeding with this claim as it had been compensated when the land administrator awarded compensation sum of RM20,424,288 which was later increased in the land reference proceedings pursuant to a consent order for a further sum of RM18,723,220.48.

[20] The first defendant also contends that the failure of the plaintiff to

obtain the extension of the planning permission from MPPP is a matter between the plaintiff and MPPP and that the first defendant had made numerous and reasonable attempts to accommodate the plaintiff's request to make adjustments to the alignment for the PORR Project affecting the plaintiff's land and the plaintiff was never precluded from proceeding with it's development project.

THE SECOND DEFENDANT'S CASE

[21] The second defendant argued that since this suit was filed in 2001 before the acquisition by the government and since the said land is now acquired and compensation for the sum of RM39,147,508.48 has been paid, the plaintiff no longer has an existing cause of action against the second defendant.

[22] It is also the second defendant's case that the planning permission was granted to I&P and not to the plaintiff and therefore the plaintiff has no locus standi to maintain this suit against the second defendant.

[23] The second defendant further argued that when the plaintiff and I&P entered into the SPA on 6 July 1995, the planning permission had already expired on 5 September 1994 as evidenced by the preamble to the SPA. The extension from 5 September 1994 to 5 September 1995 was given to I&P and not the plaintiff.

FINDINGS

[24] The plaintiff has led evidence that it suffered losses because of it's inability to continue it's development project and the failure by the defendants to acquire the plaintiff's land promptly. The plaintiff paid the renewal fee for the extension of planning permission of No 4 and No 5 on 6 September 1995, 25 August 1996 and 8 September 1997. However the extension of planning permission was rejected by letter dated 18 October 1997 from the MPPP (at p 65, bundle B) as the second defendant's consultant, ESA Jurutera Perunding Sdn Bhd had informed the plaintiff that the revision of the road alignment affecting the plaintiff's land cannot be revised further unless instructed by the second defendant (at p 62 bundle B). MPPP acted upon the instructions and directions of the defendants in rejecting the plaintiff's application for the extension of the planning permission.

[25] The defendants had revised their plans on many occasions. After the first defendant issued a letter dated 10 December 2001 (at p 625–626, bundle D) to the plaintiff informing of the intended acquisition of the 11 lots of land belonging to the plaintiff, the Pejabat Pengarah Tanah dan Galian had on 12

August 2002 decided to withdraw the proposed acquisition and refer the matter again to the first defendant (at p 114, bundle B). The plaintiff had also written letters to various authorities complaining of his predicament (see p 610, bundle D, ie letter dated 30 November 2001) where the plaintiff had complained that both the defendants, EPU and the concessionaire company Peninsular Metro Works Sdn Bhd ('PMW') have been giving all type of reasons for not acquiring the plaintiff's land. Similar letters were written to the first defendant. The plaintiff had even written a letter dated 16 March 2001 to the Prime Minister of Malaysia (see pp 610–612, 615–617, 651 and 654, bundle D).

[26] By letter dated 4 March 2001 the Director General of Public Complaints Bureau wrote to the first defendant to enquire as to when the first defendant proposed to acquire the plaintiff's land and the time frame needed for the acquisition until compensation is paid. The first defendant replied informing that the acquisition cannot be done as the concession agreement has not been signed and there is no allocation provided. The plaintiff also wrote letters dated 9 July 2002 and 15 July 2002 (at pp 667–670, bundle D) to the first defendant complaining that the final alignment for the project has changed seven times in the last five years.

[27] The said land was eventually acquired on 23 October 2003 after a long delay when a s 8 notice of the LAA was issued.

[28] It is abundantly clear that the first defendant is liable to pay damages for the delay in acquiring the plaintiff's land as SD1 himself admitted under cross-examination that:

Q: Saya katakan kelewatan ambil tanah adalah kerana LLM menunggu keputusan UPE dan JKR untuk keputusan pengambilan tanah.

A: Setuju.

[29] The first defendant is liable to pay damages to the plaintiff as from their own admission they are responsible in the acquisition of the plaintiff's land. In fact both the defendants are liable from 19 May 1997 as the second defendant's consultant had informed the plaintiff that the revision of the PORR alignment is not possible unless upon the second defendant's instruction.

[30] The defendants owe the plaintiff a duty of care to ensure that the plaintiff's property which was said to be affected by the PORR project was either formally acquired under the LAA expeditiously or the plaintiff be given liberty to develop them.

Whether the defendants are the parties responsible in the acquisition of the said land and the party that has to be referred to before the extension of the planning permission can be given by the MPPP

[31] The learned counsel for the first defendant submitted that the plaintiff has not proven that the first defendant is the decision maker or the party responsible to decide whether to acquire the plaintiff's land. The first defendant argued that the decision maker is the Government of Malaysia which has not been named as a party to the suit.

[32] The counsel further submitted that the statutory duty of the first defendant is to execute the decisions as determined by the Government of Malaysia as provided under s 11 of the HAMA. He cited *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 and *Cahaya Baru Development Bhd v Lembaga Lebuhraya Malaysia (Civil Appeal No 01–12 of 2009) (unreported)* which decided that the first defendant's statutory powers under HAMA were limited to supervising and executing the design, construction and maintenance of highways as determined by the government. The government was the decision maker and the first defendant merely the supervisor and executor of the decision. It is submitted that the first defendant has no decision making powers.

[33] He further submitted that s 8 notice under the LAA cannot in any way be construed to mean that the first defendant is the 'acquiring body' as alleged by the plaintiff. The acquiring authority is the state and the plaintiff's cause of action (if any) is against the State or the Government of Malaysia.

[34] However, it must be noted that the state acquired the land on behalf of the defendants to carry out the PORR project.

[35] The facts of the above case as cited by the counsel for the first defendant can be distinguished from the present case.

[36] The first defendant in the instant case was appointed by the second defendant by a letter dated 16 April 1998 (see p 568 bundle D). Section 4 of the HAMA clearly specifies that the composition of the Highway Authority Malaysia (Lembaga Lebuhraya Malaysia) shall consists of six representatives and one of them is the Director General, Public Works Department Peninsular Malaysia or his representative (the second defendant herein).

[37] The first defendant was aware of the rejection of the planning permission as the second defendant who was giving directions to MPPP not to renew the planning permission since 19 May 1997 was part and parcel of the

composition of the first defendant by the involvement of it's director general (see pp 55 and 62, bundle B). The first defendant was actively involved in the acquisition of the plaintiff's land when SD1, Md Sani bin Dawa (*Pegawai Pengurusan Tanah* of the first defendant) was present during the enquiry before the land administrator.

[38] The first defendant had also admitted in their statement of defence that they was involved in the land acquisition process in respect of the PORR project.

[39] The Parliamentary Secretary in the Prime Minister's Department also confirmed the first defendant's role in the acquisition of the plaintiff's land (see p 187 of bundle B). The first defendant had also issued a letter to the plaintiff informing them of the intended acquisition on 10 December 2001 only to be withdrawn later on 12 August 2002 by the Pejabat Pengarah Tanah dan Galian (see pp 113–114 of bundle B).

[40] The first defendant is a party responsible in the acquisition of the said land and was responsible before the planning permission can be given by MPPP as the director-general of the second defendant sits and forms part of the composition of the Highway Authority Malaysia which comprises of six persons. *The Hansard Report* (at pp 186–187 of bundle B) quoted by the first defendant in their submission in fact reinforces the plaintiff's case that the first defendant was the party responsible together with the second defendant in determining whether the extension of the planning permission can be issued by the MPPP. Since the acquisition process had to be frozen in order to refer the matter to the first defendant again, the first defendant's role is vital before the extension of the planning permission can be issued by the MPPP.

[41] Pages 106–106A of bundle B confirms that the first defendant has absolute powers in determining the land involved and alignment in respect of the PORR project and which will ultimately be a factor in determining whether the plaintiff will be granted an extension of the planning permission.

[42] Reference must be made to a letter dated 18 May 2007 from the first defendant to the state legal officer (at p 801 of bundle E) which gives a very strong indication that the first defendant was acting on behalf of the Government of Malaysia in the acquisition of the plaintiff's land. The letter reads as follows:

Bil.(17)dlm.LLM/UN/5-12Jld. 5

PU/PP 3081/780

18 Mei 2007

Pejabat Penasihat Undang-Undang Negeri Pulau Pinang

(State Legal Adviser's Officer)

Aras 10, Bangunan Persekutuan

Jalan Anson

10400 PULAU PINANG.

(u.p. Y. Bhg Dato Hishawati binti Shariff)

No. Faks: 04-2285544

Y. Bhg Dato',

PENGAMBILAN BALIK TANAH 15-6-2005

LOT 4723 & 12 LOT LAGI

Strongkota Development Lwn

Pentadbir Tanah Daerah Timur Laut Pulau Pinang

Dengan segala hormatnya perkara di atas dan surat Y. Bhg Dato' bertarikh 7 Mei 2007adalah dirujuk.

2. Adalah dimaklumkan bahawa Lembaga Lebuhraya Malaysia (LLM) *bagi pihak Kerajaan Malaysia* bersetuju dengan keputusan Y. Bhg Dato' untuk memberikan pampasan tambahan sebanyak 15% ke atas jumlah sebanyak RM92.00 sekaki persegi (jumlah nilaian oleh JPPH) kepada Tetuan Strongkota Development sebagai penyelesaian luar Mahkamah. Ini menjadikan jumlah pampasan yang akan diterima oleh Tetuan Strongkota Development adalah sebanyak RM105.00 sekaki persegi.

3. Namun begitu untuk makluman Y. Bhg Dato pihak *LLM kini masih dalam proses untuk memohon peruntukan daripada Kementerian Kerja Raya bagi tujuan pembayaran pampasan tambahan tersebut.* Berdasarkan Akta Pengambilan Tanah 1960, faedah sebanyak 8% akan dikenakan sekiranya pembayaran pampasan tidak dibuat dalam tempoh masa yang ditetapkan. *Ini bermakna kerajaan akan menanggung kerugian sekiranya berlaku* kelewatan *dalam pembayaran pampasan tambahan tersebut.* Sehubungan itu adalah diharapkan agar perkara ini berada dalam perhatian Y. Bhg. Dato'.

4. Justeru itu, dengan persetujuan kedua-dua pihak ke atas jumlah yang telah diputuskan di Para 2, pihak Tetuan Strongkota Development akan menarik balik sebarang tuntutan / kes Mahkamah berkenaan kes ini.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

t.t.

(NOR KAMAL BIN MD. ISA)

Timbalan Ketua Pengarah (Pengurusan)

b.p. Ketua Pengarah

Lembaga Lebuhraya Malaysia.

Edaran dalaman

•Y. Bhg Dato' Ketua Pengarah LLM

•Tuan TKP (Perancangan dan Pembangunan LLM)

•Pengarah Pengurusan Tanah, LLM

•Pengarah Kewangan dan Pentadbiran Am.

(Emphasis added.)

[43] This letter proves that the first defendant's role in this case is not merely as supervisor and executor of the government's decision in respect of the design, construction and maintenance of highways. The first defendant was actively involved in the acquisition of the plaintiff's land on behalf of the government and even had the power to decide how much compensation to be paid to the plaintiff.

[44] The second defendant was involved in the acquisition of the plaintiff's land since 1996 when the second defendant had by letter informed the MPPP that the plaintiff's development would be affected by the final alignment of the PORR project as shown in *lampiran* A of their letter (see para 9 at p 52 of bundle A and p 55 of bundle B). The said letter at p 55 was also copied to the plaintiff. The second defendant had admitted to issuing the letter at p 55 of bundle B in their defence at para 9, p 10 of bundle A.

[45] I agree with the submission of the learned counsel for the plaintiff that the second defendant is responsible for the acquisition of the said land and the party responsible before the extension of the planning permission can be granted. This is evidenced from the second defendant's letter to MPPP which was also copied to the plaintiff (see p 55 of bundle B). In fact the second defendant's consultant's reply to the plaintiff's letters (pp 60–62 of bundle B), fully confirms that the second defendant is responsible for the extension of the planning permission. Further, p 68 of bundle B confirms that the second defendant was responsible for the original layout plan of the PORR project.

[46] The letter dated 11 September 2000 from Kementerian Pengangkutan Malaysia addressed to the second defendant (p 88 of bundle B) directing the second defendant to attend to the acquisition of the said land only shows that the second defendant's role was vital in the extension of the plaintiff's planning permission.

[47] From the facts above, it is very clear that the defendants were involved in the acquisition of the plaintiff's land and were the parties responsible before the extension of the planning permission can be approved by the MPPP.

[48] Based on these grounds I dismiss the defendants argument that the defendants are not the party responsible to the acquisition of the plaintiff's land.

Whether the first defendant is under any obligation in law to take steps to acquire the plaintiff's land when the PORR alignment had not been finalised and when the concession agreement for the PORR project had not been finalised between the government of Malaysia and the concession company

[49] The first defendant's submission is that the first defendant was under no obligation in law whether under HAMA or LAA to unilaterally take steps to acquire the plaintiff's land that was affected by the PORR project when the PORR alignment had not been finalised and the concession agreement for the PORR project had not been executed between the Government of Malaysia and the proposed concessionaire company, PMW.

[50] However, SD1 in his evidence referred to the first defendant's letter dated 15 December 2000 to EPU (bundle D p 589–590) wherein the first defendant made a proposal to EPU to consider early acquisition of the plaintiff's land under ss 4 and 8 of the LAA although it was the norm for acquisition of land under s 8 of the LAA to be carried out only after the concession agreement is signed.

[51] This was reiterated in the first defendant's letter to the *setiausaha sulit* to the Prime Minister dated 15 December 2000 (bundle B p 90) that the issue of early acquisition had been referred to the EPU and the Ministry of Works for their decision on the proposed early acquisition. In fact, the defendants should have taken steps earlier to acquire the said land because as it appears from the report prepared by the Public Complaint Bureau (p 649, bundle B), the real issue relating to the implementation of the PORR project was that the concessionaire company was not able to carry out the project and suggested the government make another decision which is more practical and it gave four alternatives.

[52] The first defendant had not acted within the statutory powers in failing to take steps for the early acquisition of the plaintiff's land. It transpired that notwithstanding the fact that the concession agreement was not signed, the plaintiff's land was still acquired by the first defendant and this shows that the acquisition of the said land can be proceeded with if only the first defendant had acted expeditiously to ensure that the acquisition is finalised by advising the relevant departments. If the first defendant was going to wait until the concession agreement is finalised and executed, it was never going to happen as it appears now the entire PORR project has been cancelled or postponed indefinitely.

[53] The plaintiff should not be penalised for any delay in the acquisition through no fault of it. A

Whether the plaintiff had planning permission which was renewed by MPPP until 5 September 1995 and whether the plaintiff had development plans on the said land B

[54] The second defendant submitted that the planning permission issued by MPPP was in the name of I&P which is a different entity from the plaintiff, ie the planning permission is personal in nature. C

[55] This argument is misconceived. Although the planning permission was in the name of I&P, s 21(2) of the Town and Country Planning Act 1976 provides for the situation where the applicant is not the owner and the planning permission need not be in the name of the owner. D

[56] In this case, it is not disputed that the plaintiff has bought the land from I&P Development Sdn Bhd which already had planning permission to construct 148 units of four to ten stories medium costs apartments. This is the same project which the plaintiff bought over to develop. The planning permission was granted for the construction of those units. Section 19 of the Act only mentions that anyone intending to develop their land must apply and obtain planning permission for the proposed development activity. This section does not prohibit a subsequent purchaser to develop the same land with existing planning permission although in the name of the previous land owner. Section 19 was enacted to ensure that the project proponents in the course of developing their land adhere to government policies and development plans. E F

[57] The second defendant's contention that s 21(2) of the Act is only applicable to fresh application is misconceived. There is no provision in the said s 21 which prohibits the subsequent purchaser of the land from using the existing planning permission. G

[58] The defendants' contention that the planning permission was not issued in the name of the plaintiff was never challenged or pleaded in their statement of defence. H

[59] The second defendant's contention that the plaintiff bought the land from I&P with the expired planning permission is no longer relevant in light of the letter dated 3 August 1995 from MPPP (at p 52 of bundle B) granting the extension of planning permission until the 5 September 1995. I

[60] The evidence that Lim & Associates the architect for I&P Development

continued paying the extension fee on behalf of the plaintiff was never challenged by the defendants and therefore ought to be accepted. In fact, in the second defendant's own letter (at p 55 of bundle B) informing that the plaintiff's land was affected by the PORR project was copied to the plaintiff. The second defendant must have recognised the plaintiff as the proper applicant for the planning permission as otherwise it would not have copied the letter to the plaintiff.

[61] In this case, the plaintiff was intending on carrying out the same development work for which the planning permission was earlier given to I&P Development Sdn Bhd under ss 20 and 22 of the Town and Country Planning Act. Therefore, I am satisfied that the plaintiff bought the land with planning permission which was renewed by MPPP until 5 September 1995 and the plaintiff had development plans on the said land as seen in pp 451–480, bundle C especially at pp 286, 548 and 550.

Whether the delay in the acquisition of the plaintiff's land was caused by the PORR project and whether the failure by the plaintiff to obtain the extension on the planning permission in respect of it's development plan was due to the PORR project

[62] It is the second defendant's case that SP1 knew that the qualified title issued in respect of the said land belonging to the plaintiff provided for road reserve outside the said land and the fact that I&P had problems developing the said land because of the proposed road affecting the said land.

[63] The original plans showed the road reserve outside the said land. All 14 titles of the said land are first grade titles and the plaintiff had provided for the road reserve requirement by surrendering the area marked in orange (at p 547 of bundle C) when it purchased the property from I&P. That was the original layout plan. The area marked in green is for open space and the area marked in blue is the plaintiff's intended development. The total area surrendered by the plaintiff was 3.82 acres. However, the defendants altered the alignment on numerous occasions and finally resulting in the acquisition of the entire land. The final alignment of the PORR project which led to the acquisition of the plaintiff's entire land was a far contrast from the original layout plan.

[64] The second defendant is relying on the letter dated 19 May 1997 (at p 61 of bundle B) to establish that it was the plaintiff who had requested the change in the alignment of the road and thereby failing to obtain the planning permission. It will be noted that at the time when the letter was written on 19 May 1997, the plaintiff has complained to the second defendant who had changed the alignment three times. The plaintiff complained that it's project is being stalled and delayed as JKR Wilayah Persekutuan was still considering the alignment. In any event, the second defendant's consultant had informed the

plaintiff by letter that it was no longer possible unless instructed by the second defendant. This letter had put an end to any suggestion that the plaintiff had delayed the matter. It also establishes that the plaintiff's failure in obtaining an extension on the planning permission was due to the PORR project and the entire said land was finally acquired and the issue of allowing the plaintiff to develop part of it's land no longer arose. The alleged delay on the part of the plaintiff as claimed by the second defendant was never a reason in the report prepared by the Public Complaints Bureau (at p 644, bundle D).

Whether the acquisition of the said land for the PORR project was done within a reasonable time

[65] As at the date of filing the writ summons on 22 October 2001, the said land was yet to be acquired.

[66] There was no evidence of any interference by the plaintiff or the plaintiff being the cause of the delay. In fact the Public Complaints Bureau in its report to Pejabat Perdana Menteri (especially at p 649 of bundle D) had come to a finding that the concessionaire company was not able to carry out the project and suggested that the government make another decision which is more practical and provided alternative, ie:

(a) that the government attend to the acquisition earlier for all lands affected by PORR and pay compensation;

(b) to cancel the PORR project and allow the plaintiff to develop its land;

(c) to change the alignment of the PORR out of the plaintiff's land although this will cost more; and

(d) the project be undertaken by the government fully without privatising the project.

[67] From the evidence it was showed that the targeted commencement date for the PORR project was 2003 and the targeted completion date was 3½ year later ie mid 2006 (see p 80 of bundle B). However, as at 10 October 2002, (see the *Hansard* at p 187 of bundle B) the terms and conditions of the privatisation agreement was yet to be finalised.

[68] The cases relied on by the first defendant: *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee* [1983] 2 MLJ 35, *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v Kam Gin Paik & Ors* [1986] 1 MLJ 362, and *Pemungut Hasil Tanah, Kuantan v Oriental Rubber & Palmoil Sdn Bhd* [1986] 1 MLJ 39 can be distinguished. All those cases was in respect of the delay in holding the inquiry of the assessment of damages after the gazette notification. In the instant case, the said land was not gazetted for six years after

the planning permission was not extended. Planning permission was not renewed from 19 May 1997 and the said land was gazetted for acquisition on 23 October 2003 and the entire acquisition process culminated in a consent order being entered between the parties on 6 August 2007. If not for the PORR project and the direction by the second defendant to MPPP, the plaintiff's planning permission would have been approved and the plaintiff could have proceeded with it's development work.

[69] I therefore agree with the plaintiff's submission that the acquisition was not done within a reasonable time. In my opinion the above facts in fact, lends support to the plaintiff's claim about the delay in making decision on the acquisition. The issues raised by the defendants is an internal problem of the first and second defendants and the relevant government agencies. The plaintiff should not be made to suffer for this.

Whether the plaintiff has suffered losses and whether the plaintiff is entitled to claim damages in the sum of RM48,736,931.70 as claimed in the amended writ of summons dated 14 October 2008

[70] The defendants were always dealing with the plaintiff specifically by correspondence and conducting various meetings to address the issues involving the plaintiff's land which was affected by the PORR project. SP1 had attended meetings with the defendants and the relevant government agencies on many occasions and it is therefore incumbent on the defendants that since there is an assumption of liability to the plaintiff which relationship between the parties amounts to almost contractual. The defendants' conduct in issuing correspondence and holding various meetings all give rise to a responsibility as the plaintiff had acted upon the information and directions by the defendants in not renewing the planning permission and at the same time informing the plaintiff that the said land was going to be acquired for the PORR project. The defendants had created a duty of care towards the plaintiff when attending to all the correspondence and meetings with the plaintiff to ensure that the plaintiff does not suffer financial loss as a result of the defendants' action or inaction. Lord Devlin in the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at pp 610–611; [1964] AC 465 at p 529 said:

> I do not understand any of Your Lordships to hold that it is a responsibility imposed by law upon certain type of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.

[71] Further, Lord Goff added in *Henderson v Merrett Syndicates & Others* [1994] 3 All ER 506:

> From this statements, and from their application in *Hedley Byrne*, we can derive some understanding of the breadth of the specific type to a particular transaction and which may or may not be contractual in nature. All of Their Lordships talk in terms of one party having assumed or undertaken a responsibility towards the other.

[72] From the facts, it is clear that the defendants could reasonably foresee that the instructions to MPPP not to renew the plaintiff's application of it's planning permission and in delaying the formal acquisition of the plaintiff's land, the plaintiff will suffer losses. In the article *Voluntary Assumption of Tort Liability in English Law: A Paradox* by Stathis Bankas (Barcelona, October 2009) (www.indret.com), it was said that:

> Although the parameters of the formation of a valid Contract are reasonably wide, restrictions imposed in a legal system on liability in Tort (i.e. limitation of claims in time, narrowly defined vicarious liability and heads and size of damages) may not allow the fair treatment of claims arising out of direct dealings between the parties, in situations in which a valid Contract cannot be inferred, the generous conditions of formation of Contracts, recognized by the legal system, notwithstanding (this is the case, for example, in German law). Finally, assumption of liability may be used as a basis of extra-contractual liability in order to provide a means of limitation of liability for difficult types of negligent harm. Indeed, the idea of assumption of responsibility as the basis of extra-contractual liability first came into existence in English law in connection with claims for the compensation of types of non-intentional harm other than physical personal injury, notably, psychological and psychiatric harm, nervous shock and pure economic loss.

[73] The defendants have assumed a responsibility toward the plaintiff and must therefore ensure that the plaintiff did not suffer any loss as a result of their action.

[74] It is my finding that based on the reasons above, the defendants failed to acquire the plaintiff's land formally within a reasonable time and as a result the of which the plaintiff suffered losses.

[75] On the issue of damages the plaintiff sought the following reliefs:

(a) damages for a sum of RM48,736,931.70, from the defendants to be paid at a sum to be decided by this court;

(b) exemplary damages;

(c) interest on the damages at the rate of 8%pa from 19 May 97 until full payment; and

(d) costs, and such other reliefs deemed fit by this honourable court.

[76] The particulars of the damages sought are set out in part (1), (2) and (3) under Annexure A of the plaintiff's claim which includes the loss of use of land and loss of income from the intended development of the said land. It is not disputed that when the plaintiff's claim was filed on 22 October 2001 the said land was yet to be acquired. By the time when this matter was tried in court the land was already acquired.

[77] However during the trial SP1 testified that the plaintiff suffered a loss of RM40,704,523.12 particularised as follows:

i Interest claim of RM31,446,992.73. The plaintiff contended that the 8.41 acres of land had been valued by Raine & Horne International in 1996 at RM109.00 psf and which amounts to RM39,931,016.40. However, the plaintiff submitted that it is prepared to accept a valuation of RM105.00 psf for the said land which is the sum agreed by the parties in the Consent Order dated 6.8.2007 when the said land was formally acquired by the State. Therefore, based on this valuation of RM105.00 psf as per the Consent Order the total value of the land would be RM38,465,658.00 (Area of land: 8.41 acres x 43560 x RM105.00 psf = RM38,465,658.00). The plaintiff is now claiming interest at 8% per annum from 19.5.1997 to 6.8.2007 on this amount which works out to RM31,446,992.73;

ii Loss of income of RM8,759,710.00. The plaintiff could not proceed with the development project to build the 148 units of apartments as the planning permission that was earlier granted by MPPP was not extended due to the PORR project. SP2, the Quantity Surveyor gave evidence on behalf of the plaintiff that the plaintiff suffered a loss of RM8,759,710.00 being loss of income from the sale of the 148 units of condominiums. SP2 gave evidence based on the costs estimate and report prepared by him at pages 420 to 480 in Ikatan C.

[78] The first defendant submitted that the plaintiff's claim is baseless as the Raine and Horne's Valuation Report is incomplete and does not contain any credible basis as to how this value arrived at RM109 psf in 1996 as there are no comparables. The second defendant also argued that in the absence of proper and reliable valuation report, the plaintiff's claim ought to be disregarded.

[79] It is my finding, that apart from criticising Raine and Horne's Valuation Report, the first defendant failed to produce any other valuation report to counter the report from Raine and Horne.

[80] The first defendant's contention that SP2 is not an expert is misconceived and cannot be accepted as the defendants had never challenged SP2's capacity as a chartered surveyor. The defendants further failed to

challenge or dispute SP2's qualifications. The defendants also failed to produce any witnesses to counter the report prepared by SP2.

[81] There was no requirement for SP2 to produce his curriculum vitae as his capacity as a qualified chartered surveyor was never challenged.

[82] SP2's report is the only report before this court. It is not open for the defendants to now say that there was no basis for SP2 to arrive at his conclusion on the plaintiff's anticipated return. The defendants should have prepared a counter report to challenge the plaintiff's claim on the anticipated returns.

[83] From the facts, it is my finding that the defendants could reasonably foresee that by their actions in delaying the formal acquisition of the plaintiff's land, the plaintiff would have suffered losses. In fact, as at the date of filing the writ on 22 October 2001 the land was yet to be acquired. It is therefore fair, just and reasonable that the plaintiff be given a remedy to seek damages against the defendants.

[84] The plaintiff submitted that the sum of 8% is reasonable as the plaintiff's witness, SP1 testified that he had to pay loans with interest at 12.8%pa payable every month.

[85] On the damages I am willing to accept the valuation of RM105 psf based on the consent order recorded by parties on 6 August 2007 as a fair value, as the delay of ten years (from 19 May 1997 to 6 August 2007) in acquiring the land and payment of full compensation in respect of the value of the land is a loss foreseeable by the defendants and reasonable because had the plaintiff's land been acquired in 1997 when the planning permission was not extended and when the plaintiff was informed that the revision of the alignment was no longer possible, the plaintiff should have been compensated for the value of his land and it would be able to make use of the compensation amount.

[86] I also find that the plaintiff is entitled to claim interest on the value of the land. In *Chandra Bansi Singh and others v State of Bihar and others* AIR 1984 SC 1767 the court decided that 'the appellants should get an equitable compensation in the form of interest calculated at the rate of 7½% pa for two years on the value of the land owned by each landowner'. The fact in *Chandra Bansi Singh*'s case is basically the issue of delay from the date of notification and taking over possession of land.

[87] The defendants' here also had never challenged the plaintiff's claim for interest charged on the value of the land. The plaintiff has led evidence through SP1 which the defendants failed to challenge or refute on the interest charges paid by the plaintiff to the chargee bank or the expenses or losses incurred

during this period of ten years. The plaintiff's evidence must therefore be accepted — see *Superintendent of Lands and Survey (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 and *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144.

[88] After hearing the submissions and going through the evidence damages is allowed in the sum of RM7,693,131. This sum is arrived at in the following manner ie 8.41 acres x 43560 x RM105 psf = RM38,465,658.00 x 2% x ten years = RM7,693,131. I arrived at the interest rate of 2% because this is the rate which is normally paid for money deposited in court in respect of land acquisition matters. There is also a provision of 8% for late payment charges in respect of the delay in the payment of compensation awarded under s 32 of the LAA but I am awarding 2% interest on the value of the land as it would be a fair amount on the basis that if the land has been acquired in 1997 and the compensation amount deposited in court, the plaintiff would have been entitled to interest at 2% on the amount deposited in court.

[89] The authority cited by the second defendant in *Uda Holdings Bhd v Koperasi Pasar Raya (M) Bhd and other appeals* [2009] 1 MLJ 737 as proposition to say pure economic loss is not allowed in Malaysia must be confined to the facts of that case. In that case a public road was converted into a temporary occupational license ('TOL') and the relevant provisions of the National Land Code were applicable. Abdul Aziz Mohamad FCJ also held that the TOL could not be a statutory defence to the claim in public nuisance because the issuance of the TOL over the public road was not authorised by Parliament and the closure of the public road was not the inevitable result of the issuance of the TOL. The issue in that case was public nuisance. The court decided in that case that ss 12 and 46 of the Street, Drainage and Building Act 1974 show that it precludes any construction that any breach thereof would result in a party being able to claim financial loss arising there from.

[90] The facts in this instant case are not so much on the breach of it's statutory duty by the defendants but on the assumption of responsibility by the defendants to the plaintiff leading to liability for damages as a result of the defendants' delay in formally acquiring the plaintiff's land. Lord Goff in *Stansbie v Troman* [1948] 2 KB 48 commented that 'such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier'. In the case of *Welsh v Chief Constable of the Merseyside Police* [1993] 1 ALL ER 692, it was held that where the prosecution or police service had given an undertaking to take some action, it could owe and affirmative duty to take reasonable care to honour the undertaking. This assumption of responsibility can be implied in the present case when meetings were held between the

plaintiff and defendants and correspondence exchanged assuring the plaintiff that the land was going to be formally acquired only to be delayed much later.

[91] On the defendants argument that the plaintiff no longer has an existing cause of action against them as the plaintiff had been compensated for the sum of RM39,147,508.48, my answer is this. I have considered the fact that compensation of the value of the land was made pursuant to consent order dated 6 August 2007 in the land reference proceedings vide Penang High Court Suit No 15–6 of 2005. However, this civil suit (which was filed in 2001) was already in existence at the time the land reference proceedings was filed and from the consent order of the land reference proceedings, it is noted that there was no reference to a settlement which involved this existing civil suit. In short, there was no global settlement of this civil suit and the land reference proceedings as claimed by the defendants. SD1 also admitted that the compensation amount paid under the consent order was only in respect of the value of the land and not in respect of the damages sought in this civil suit.

CONCLUSION

[92] For the reasons stated above, I found that the plaintiff had on the balance of probabilities proved their case against the defendants. The defendants are equally liable. I allowed the claim as follows:

(a) (i) damages in the sum of RM7,693,131 for loss of interests at 2%pa on the land area of 8.41 acres at RM105 per sq foot (ie the amount agreed by parties in the consent order in the land reference proceeding at the High Court Penang No 15–6 of 2005) from 19 May 1997 and 6 August 2007 ie ten years in the following manner: 8.41 acres x 4 3,560 x RM105 ps fs = RM38,465,658 x 2% x ten years = RM7,693,131; and

(ii) the damages of RM8,759,710 for loss of income from the 148 units of apartment is disallowed. To allow this claim would amount to a duplicity in this damages.

(b) claim for exemplary damages is disallowed;

(c) interest at 8%pa on the judgment sum of RM7,693,131 from the date of judgment until full payment; and

(d) costs RM50,000.

Claim allowed with interest and costs.

Reported by Kohila Nesan